

DEPARTMENT OF JUSTICE

DEPARTMENT OF THE TREASURY

OFFICE OF MANAGEMENT AND BUDGET

Public Comment on Financial Privacy and Bankruptcy

AGENCIES: Department Justice, Department of the Treasury, and Office of Management and Budget

SUMMARY: The Department of Justice, Department of Treasury and Office of Management and Budget, in consultation with the Administrative Office of the U.S. Courts, are conducting a study (the "Study") of how the filing of a bankruptcy affects the privacy of individual consumer information that becomes part of a bankruptcy case. The Study will consider how the privacy interests of debtors in personal bankruptcy cases are affected by the public availability of information about them in those cases. It will also consider the need for access to this information and accountability in the bankruptcy system. Finally, it will consider how changes in business practices and technology may affect all of these interests. To assist in the Study, these agencies are requesting public comment on a series of questions.

DATES: To ensure their consideration in the Study, comments and responses to the questions listed below, along with any other comments, should be submitted by September 8, 2000.

ADDRESSES: All submissions must be in writing or in electronic form. Written submissions should be sent to Leander Barnhill, Office of General Counsel, Executive Office for United States Trustees, 901 E Street, NW, Suite 780, Washington DC 20530. Electronic submissions should be sent by email to USTPrivacyStudy@usdoj.gov. The submissions should include the submitter's name, address, telephone number, and if available, FAX number and e-mail address. All submissions should be captioned "Comments on Study of Privacy Issues in Bankruptcy Data."

SUPPLEMENTARY INFORMATION:

I. Background

On April 30, 2000, the President announced the "Clinton-Gore Plan to Enhance Consumers' Financial Privacy: Protecting Core Values in The Information Age." As part of the Plan, the President directed three federal agencies to conduct a study on how best to handle privacy issues for sensitive financial information in bankruptcy records, including the privacy impact of electronic availability of detailed bankruptcy records, containing financial information of vulnerable debtors." The Study, to be jointly conducted by the Department of Justice, the Department of Treasury, and the Office of Management and Budget (the "Study Agencies"), will be prepared in consultation with the Administrative Office of the U.S. Courts, and will be completed by December 31, 2000. The Study Agencies are requesting public comment on a series of questions regarding privacy issues related to records that are established in the course of bankruptcy proceedings conducted in federal courts, including questions raised by electronic access to such bankruptcy records. The Study Agencies solicit responses to any or all of the questions listed below and welcome any other comments on these topics.

The Study Agencies also are aware of public attention in recent weeks focused on the troubling practice of organizations in bankruptcy seeking to sell personal data regarding their former customers, in violation of such organizations' privacy policies. Although this issue is outside the main scope of the Study – the privacy needs of debtors – the Study Agencies believe that this topic also involves the intersection of privacy and bankruptcy, and merits further attention. In part because of pending regulatory enforcement actions and/or pending legislation, the Study Agencies are not making this subject part of the formal Study. Nevertheless, the Study Agencies invite comments about the effect that a business bankruptcy filing has on consumer/customer information that the business has collected. Comments should not address pending legislative proposals or regulatory activities. After reviewing the comments and any other developments, the Study Agencies will determine whether it is appropriate to examine this issue in greater depth.

Currently, there are two different types of data maintained and used in a bankruptcy proceeding. The first is information in a court record that is made available to any member of the public. The second is information held by trustees administering bankruptcy cases that is not generally available to the public. These two categories of data are referred to here as **Apublic record data@** and **Anon-public data,@** respectively, and they are described more fully below. Each is currently governed by a different set of rules and procedures, and the privacy and access interests in each may vary.

A. Public Record Data

A consumer or individual who files a case under either chapter 7 or chapter 13 of the Bankruptcy Code, 11 U.S.C. ' 101 et seq., must provide detailed financial information as part of the schedules filed with the bankruptcy court. This includes a list of bank accounts and identifying numbers, credit card account numbers, social security numbers, balances in bank accounts, balances owed to creditors, income, a detailed listing of assets, and a budget showing the individual's regular expenses. By statute, 11 U.S.C. § 107(a), all documents filed with the court are "public records and open to examination by an entity at reasonable times without charge." Bankruptcy trustees (private entities appointed by U.S. Trustees) obtain this information in the course of administering cases assigned to them.

Much of the information provided in connection with a bankruptcy case is similar to financial information that, in other contexts, such as banking and credit reporting, may be covered by a system of regulation designed to ensure the confidentiality of such information. For example, in other contexts, an individual would be given notice of what uses might be made of the individual's bank account information or social security number, and would have some degree of choice as to how such information will be used. Security safeguards may also attach to the information.

In the past, access to public court record data has as a practical matter been quite limited. The individuals who obtained individual case files from the courts were those willing to spend considerable time, effort, and sometimes money. The development of electronic databases and other technologies allows for more widespread dissemination of information in bankruptcy records, along with far more convenient access, including access via the Internet. In some

instances, courts are adopting technologies to convert their paper files to electronic form. This could result in a high volume of court records, including records containing sensitive personal information, appearing on the Internet.

B. Non-Public Data

While substantial amounts of personal data are filed by debtors in the bankruptcy courts, additional data are gathered by bankruptcy trustees in the course of administering the cases assigned to them. The trustee often will collect information about claims filed by creditors in a given case. The trustee also may find it necessary to supplement information that a debtor has provided in the bankruptcy schedules, and may request tax returns, as well as supporting information about the value of the debtor's assets, amounts of liabilities, and routine living expenses. The trustee's files also may contain information gathered from investigations about alleged wrongdoing in the case. In chapter 13 cases, the trustee tracks a debtor's payments to creditors under a payment plan. In general, only the parties in interest in a bankruptcy case (as defined by the court) receive both public and non-public data. By statute, the trustee "shall, unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest." 11 U.S.C. §§ 704(7), §1302(b)(1). However, there are no well-defined limits on the trustee's authority to provide this information to others, nor on the authority of such third parties to use, sell, or transfer this information. In addition, some trustees and creditors are considering compiling information contained in

bankruptcy records electronically for easier administration of bankruptcy cases in which they have a claim. They may also envision some possible commercial use.

II Elements of the Study

The Study will examine:

- \$ The types and amounts of information that are collected from and about individual debtors, as well as analyzed and disseminated, in personal bankruptcy cases.
- C Current practices, and practices envisioned for the future, for the collection, analysis, and dissemination of information in personal bankruptcy proceedings.
- \$ The needs of various parties for access to financial information in personal bankruptcy cases, including specifically which individuals or entities require access to which particular types of information, for what purposes, and under what circumstances.
- \$ The privacy issues raised by the collection and use of financial and other information in personal bankruptcy cases.
- \$ The effect of technology on access to, and the privacy of, a debtor's personal information.

\$ Business or governmental models that can provide access to, and protect debtors' privacy interests in, bankruptcy records.

\$ Principles for the responsible handling of information in bankruptcy records, and recommendations for any policy, regulatory, or statutory changes.

II Questions to be Addressed

The Study Agencies seek comment and supporting information from all sources, including bankruptcy professionals, consumer representatives, privacy advocates, creditors, information brokers, the academic community, and the general public. The Study Agencies will summarize the comments in the Study. Views are welcome on any aspect of this subject, but the following questions are offered to stimulate thought in specific areas of interest.

1.01 What types and amounts of information are collected from and about individual debtors, analyzed, and disseminated in personal bankruptcy cases?

- (1.1) What types of information are collected, maintained, and disseminated in bankruptcy?
- (1.2) Which of these data elements are public record data?
- (1.3) Which are non-public record data held by bankruptcy trustees?
- (1.4) How much data is at issue?
- (1.5) Are certain types of data more sensitive than others; that is, are there types of data in which debtors would have a stronger privacy interest? If so, which ones?

(1.6) How valuable is the information in the marketplace?

2.0 What are the current practices, and practices envisioned for the future, for the collection, analysis, and dissemination of information in personal bankruptcy proceedings?

(2.1) What methods of data collection and aggregation are now used by the courts, creditors, trustees, and other private actors to collect, analyze, and disseminate public record data and non-public data?

(2.2) What methods are being contemplated for the future?

3.0 What access do various parties need to financial information in personal bankruptcy cases? Which individuals or entities require access to which particular types of information, for what purposes, and under what circumstances?

(3.1) What entities currently access public record data?

(3.2) What entities currently access non-public data from trustees?

(3.3) What specific data elements do they need, and for what purposes?

(3.4) Are the purposes for which the information is sought consistent with the public interest?

A. Public Record Data

- (3.5) What data elements in public record data should remain public for purposes of accountability in the bankruptcy system? For other purposes?
- (3.6) Is there certain information that need not be made available to the general public, but could be made available to a limited class of persons?
- (3.7) If so, what are these data elements, to whom should they be made available, and for what purpose?
- (3.8) Is there a need to make the following data elements publicly available: (a) social security numbers, (b) bank account numbers, (c) other account numbers?

B. Non-Public Data

- (3.9) What issues, if any, are raised by existing limitations on trustees' handling of personal information?
- (3.10) Are all of the data elements held by bankruptcy trustees necessary for case administration purposes? If not, which data elements are not?
- (3.11) What interests would be served by private or commercial enterprises collecting, compiling electronically, and redistributing information from bankruptcy cases?

4.0 What are the privacy issues raised by the collection and use of personal financial and other information in personal bankruptcy proceedings?

A. Public Record Data

- (4.1) Do debtors have privacy interests in information contained in public record data made available through the bankruptcy courts? If so, what are those interests? Do they vary by data element? If so, how?
- (4.2) What are the benefits of a public record system for court records in bankruptcy cases?
- (4.3) What are the costs of collecting and retaining data in bankruptcy cases?
- (4.4) To what extent do individuals who file for bankruptcy understand that all of the information contained in the public bankruptcy file is available to the public?
- (4.5) Should debtors in bankruptcy be required to forego some expectation of privacy that other consumers have under other circumstances?
- (4.6) Are there characteristics about debtors in bankruptcy that raise special concerns about wide public dissemination of their personal financial information?

B. Non-Public Data

- (4.7) What are debtors' expectations about what uses and disclosures of information will be made by bankruptcy trustees?
- (4.8) What, if any, privacy interests lie in non-public bankruptcy data held by bankruptcy trustees?
- (4.9) If non-public data were made widely available to the public or to creditors for other non-bankruptcy purposes, what might be the consequences?
- (4.10) Are privacy interests affected if the distribution of non-public data bankruptcy information is for profit?

5.0 What is the effect of technology on access to and privacy of personal information?

- (5.1) Do privacy issues related to public record data in bankruptcy cases change when such data are made available electronically? On the Internet? If so, how?
- (5.2) Do privacy interests in non-public data change when such data are compiled electronically for ease of administration of bankruptcy cases? For commercial use? For other use?
- (5.3) Are new technologies being used to improve access to court records? Non-public bankruptcy data? Should they be? Why or why not?

6.0 What are current business or governmental models for protecting privacy and ensuring appropriate access in bankruptcy records?

- (6.1) What statutes, rules, or policies can serve as models for maintaining appropriate levels or access and privacy protection for public bankruptcy records? For non-public bankruptcy information held by trustees?
- (6.2) What statutes, rules, or policies are ineffective in providing appropriate access and privacy interests?
- (6.3) What statutes, rules, or policies, are otherwise relevant to this Study?

7.0 What principles should govern the responsible handling of bankruptcy data? What are some recommendations for policy, regulatory or statutory changes?

A. Public Record Data

- (7.1) To what extent are privacy safeguards appropriate for public record data? If safeguards are appropriate, what should they be? How should they be crafted to ensure that they do not interfere with legitimate public needs to access certain bankruptcy data?
- (7.2) Should notice about the public nature of bankruptcy filings be provided to individuals who file for bankruptcy? What form should such notice take?
- (7.3) Should there be any restrictions on the degree of accessibility of such information, such as rules that vary if information is made available electronically? via the Internet? If so, what should they be? Should policies on the handling of information in bankruptcy cases be technology neutral, so that the rules for dealing with information are the same regardless of what medium is used to disclose such information? Why or why not?
- (7.4) Are there any data elements in public record data that should be removed from the public record and held instead as non-public data by bankruptcy trustees or courts?
- (7.5) Is there some experience with other public records that is relevant to the privacy and access issues in bankruptcy cases? Do any records or filing systems, for example in the courts, provide instruction in this regard?

B. Non-Public Data

- (7.6) To what extent are privacy safeguards appropriate for non-public data held by bankruptcy trustees in bankruptcy cases? If some safeguards are appropriate, how should they be structured? How should they be crafted to ensure that they not interfere with the needs of bankruptcy trustees to administer their cases?

- (7.7) Should debtors receive notice of what uses and disclosures will be made of their information in the hands of bankruptcy trustees? What would be the effects of such disclosures?
- (7.8) Should restrictions be imposed on the use and disclosure of information held by bankruptcy trustees? If so, what types of restrictions? What would be the effects of such restrictions?
- (7.9) Should debtors be permitted to access the information held about them by bankruptcy trustees? If so, under what circumstances? What would be the effects of such access?
- (7.10) If bankruptcy data are compiled and made easily and widely available to users outside of the bankruptcy system, should these users be charged for the collection and distribution process? How would the amount of the charge be set?

Date: 7/21/2000

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